

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

_____)	
FREDRIC N. ESHELMAN,)	
)	
Plaintiff,)	
)	
vs.)	
)	7:16-CV-00018-D
PUMA BIOTECHNOLOGY, INC.,)	
)	
Defendant,)	
_____)	

MARCH 1, 2019
PRETRIAL MOTIONS
BEFORE THE HONORABLE JAMES C. DEVER, III
UNITED STATES DISTRICT JUDGE

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1 (Friday, March 1, 2019, commencing at 1:00 p.m.)

2 THE COURT: Good afternoon, and welcome to the United
3 States District Court for the Eastern District of North
4 Carolina. We're here today for the pretrial conference in the
5 *Eshelman* case. If I could have counsel introduce themselves,
6 starting with the Plaintiff's counsel.

7 MR. TOM CLARE: Good afternoon, Your Honor. My name
8 is Tom Clare. I'm from the law firm of Clare Locke, L.L.P.,
9 from Alexandria, Virginia. With me I have my partner, Megan
10 Meier, and Daniel Watkins, as well as our counsel, Andy McVey,
11 here representing the Plaintiff. It's our privilege to be
12 here, and thank you for having us.

13 THE COURT: Thank you.

14 MR. DAVID LEVY: Judge, good afternoon. Dave Levy,
15 along with Devlin Horton, with the Hedrick Gardner law firm
16 here in North Carolina.

17 THE COURT: Okay. Thank you. Good to have y'all
18 here. I wanted to obviously go through some things, and then I
19 will tell you that we are going to get back together again next
20 Friday at 2:00. We're going to get through some of our
21 materials today, and we're going to get through the rest of the
22 materials next Friday.

23 And I have reviewed the joint pretrial order. I have
24 -- I added a signature line and an approval line at the end of
25 that, and that will be made part of the record. I did want to

1 say with respect to the -- as I understand it, the highlighted
2 portions were objected to by Puma based on relevance. Is that
3 right?

4 MR. LEVY: That's correct, Judge.

5 THE COURT: Okay. But they -- but those are all --
6 they're stipulated facts, but y'all just object to those. Is
7 that right?

8 MR. LEVY: That's correct.

9 THE COURT: Okay. All right. Well, I have gone
10 through them, and I overrule a relevance objection except as to
11 paragraph 21, which I think has to do with Dr. Eshelman being a
12 philanthropist or something to that effect.

13 So 1 -- so basically on the stipulations, paragraphs
14 1 through 147 are going to be admitted as stipulations. I
15 stopped at 147, the -- and then -- and I didn't include 148
16 through 152, which is -- basically it's going to end with
17 Dr. Eshelman filing the defamation lawsuit.

18 So -- and what I would like and what I think is --
19 and I'm going to read those stipulations to the jury at the
20 beginning of the case, but I think what's most useful -- when I
21 have just a few stipulations, I will include them in the jury
22 instructions and just -- you know, if I have ten stipulations
23 or even 20 or 30.

24 But if I have this many, I think it's most efficient
25 to have a separate exhibit created so that if -- and I'd ask

1 Mr. Clare, if you could take the lead on that, just -- and just
2 whatever exhibit number it is, that I'll -- then in the
3 instructions I will cross-reference that, that the parties have
4 stipulated in exhibit -- Plaintiff's Exhibit Number whatever.
5 And I will obviously have told them what a stipulation is when
6 I -- at the beginning of the trial and then in my final charge,
7 but I think that's more efficient than me reading those to them
8 more than that first time.

9 I'm going to read those, and I appreciate y'all
10 working through that, 'cause I think it helps orient them to
11 kind of what we're all here about.

12 And so if you could just break those out, 1 through
13 147, but not paragraph 21, and then that will also be an
14 exhibit.

15 I'm going to go through the pretrial order here in a
16 moment. The motion to bifurcate at docket entry 354 and the
17 Plaintiff's response, I will grant that. We'll deal with the
18 issue of liability and compensatory damages and then deal with
19 punitive damages if we need to.

20 And in terms of just timing of how I think things
21 will play out during the week of the trial -- and I'll hear
22 from y'all, but I anticipate obviously we're going to pick the
23 jury Monday. That won't take too long. And I would anticipate
24 or my goal is that we get the case to the jury on the issue of
25 liability and compensatory damages by the end of the day

1 Thursday, which means I have to finish my charge. I want them
2 to be deliberating. And if I charge sort of to the end of the
3 day, and that's kind of what I'm thinking, then they have
4 Friday and, you know, there's no time limit on their
5 deliberations. But if they had a verdict that day, then I
6 would anticipate dealing with punitives on Monday.

7 And so kind of working back, I can just tell you --
8 and these are rough estimates that I want to give you, but I
9 try a lot of cases, and especially -- well, just because of how
10 many cases we have here -- I think this is my fifth trial this
11 year, and I'll have 13 more before the end of August. And so
12 trial time is at a premium around here.

13 And I have absolutely no problem and I would -- I'll
14 just tell you, if there are legal issues we need to talk about,
15 we will talk about them early in the morning. We will talk
16 about them when the jury is eating lunch. We will talk about
17 them late into the night if we have to. But when the jurors
18 are in this building, they will either be eating at a break or
19 listening to witnesses.

20 And so you'll find that the schedule that I -- you
21 know, the first day we'll bring them up here at 10. We'll get
22 through the jury selection process. That's a little bit of a
23 -- and I give them some preliminary instructions after we get
24 them picked, but I certainly think, say, by 1:00, we'll be
25 working up until 5:00. Some of our jurors have to drive quite

1 a distance to get here, so I always let them know that I'm
2 letting them go home by 5.

3 But once we get sort of -- when I think about
4 Tuesday, Wednesday, Thursday, the schedule that I follow is we
5 start at 9, we bring them in at 9. We go to 10:30. We take a
6 15-minute break. We come back at 10:45 and we will go till
7 12:15. We will have lunch brought in for them. They will eat
8 from 12:15 to 1:00. We will come back in the courtroom and we
9 will hear evidence until 2:45. We will take a break from 2:45
10 to 3:00. We will work from 3:00 until 4:45. Then I will let
11 them go home.

12 And my own math on timing, as I think about it, when
13 we think about -- and I have to build in time for me to give
14 preliminary instructions and me to give the charge on the back
15 end, but my own rough estimate with -- for purposes of the
16 liability phase of the trial is that each of y'all get 11
17 hours, as I do the math.

18 And what -- and how I count it -- again, it's your
19 time and you can be a steward of your own time. I'm confident
20 that none of you are going to get up and give an opening of ten
21 hours, but if you did, you'd have one hour left for the rest of
22 your case. I would not tell you to sit down. I let the
23 lawyers figure out how they want to use their time. I keep the
24 time myself so that -- and the way I keep it is if you're
25 crossing a witness, that's your time, right? So that it'd be

1 -- your direct, that's -- whoever called that witness, that's
2 your time, and then I just sort of -- and I try and give the
3 lawyers an estimate at the end of the day about kind of where I
4 think we are.

5 And I've done this in a lot of civil trials, and it
6 really helps people focus instead of just sort of a limitless
7 time, which we just don't have that. And then I also find that
8 it helps then make -- when there are objections about hundreds
9 of documents, people really get to focus.

10 And y'all are good lawyers and you know the documents
11 you're going to talk about, and you know the documents that
12 you've listed in the pretrial order that, yeah, you don't need;
13 they're not going to be the documents you talk about, the last
14 document you talk about. Y'all know the documents that are the
15 key documents for your case. I know you do.

16 And, again, it just helps you take -- stay focused.
17 So that's kind of where --

18 And then on the -- when I think about the Monday, if
19 we get that -- if the jury returns a verdict for Dr. Eshelman,
20 I would think there we'd be looking at two and a half hours
21 each for y'all. And that gives me time to give them a charge
22 and maybe even have them have a little chance to deliberate
23 that day and then on into Tuesday. I don't put time limits --
24 and, again, if they're still deliberating on Monday, then
25 obviously we just wait for them. But that's -- I just wanted

1 y'all to get a sense of that. And so the clock really
2 doesn't --

3 I mean, the jury selection, again, I can tell you how
4 I do it. I realize different judges do it differently. We'll
5 put 18 people in the box. We actually add chairs toward the
6 end of the box. Each of y'all get three peremptories. If we
7 don't have any cause challenges, we'll have 12 right then. I
8 know particularly in civil cases, each side wants to get a
9 perfect jury for their perspective. I'm interested in getting
10 a fair jury. So the questions -- I'll read the questions that
11 y'all had submitted and think about asking those, but I have
12 some fairly standard ones that I ask in civil cases.

13 And then I'll call y'all to the bench. I will hear
14 anybody that wants to talk about cause just so that you know
15 before exercising your peremptories whether I'm taking somebody
16 out for cause. And then if -- let's assume I don't take anyone
17 out for cause. Then I just have y'all go back and I tell the
18 jury about the history of our court -- a little bit of the
19 history of our court. You look up when you're ready to come
20 back up here.

21 And then I go one each. So, you know, Plaintiff's
22 counsel, who would you like to excuse. So they don't know
23 who's excusing. I don't have you do it from the bench -- I
24 mean, from where you're seated. I'll just keep track of those,
25 and it's just one, one, one, one. Assuming that each of you

1 use your three, then we'll end up with 12 in there. We'll see.
2 I mean, on the issue of just anticipating. I know some judges
3 are insistent on 12, even though the rules don't require that.
4 We'll see where we are. If we ended up taking one out for
5 cause and we were able to just go with an 11-person jury, I've
6 certainly done that in a lot of cases and I'm comfortable doing
7 that. I mean, I know I have some colleagues who are 12 only,
8 and I have some colleagues who are very comfortable starting
9 with six. I've never started with six because things happen
10 and it just can result in us not being good stewards of time.

11 So that's -- are there any questions about that
12 process from the Plaintiff?

13 MR. CLARE: No, Your Honor.

14 THE COURT: Okay. Any from the defense?

15 MR. LEVY: Judge, just very briefly on the issue of
16 time allocation just --

17 THE COURT: Right.

18 MR. LEVY: -- so that we're clear. I understand the
19 11 hours on the liability phase is inclusive of opening --

20 THE COURT: Right.

21 MR. LEVY: -- statements and closing argument. If
22 there is an adverse witness called by Plaintiff, for example,
23 during their case in chief, is that still inclusive of their 11
24 hours, or does that start the clock as it pertains to
25 defendants?

1 THE COURT: Well, I mean, I would look at that as
2 still if the -- you know, if the plaintiff calls Mr. Auerbach,
3 for example, in its case or in his case, I'm confident that
4 there would not be open-ended questions asked of that witness.
5 And so, again, in terms of encouraging lawyers to be efficient
6 with their time and to be good stewards of their own time, then
7 if you call the witness, then it's your time.

8 Now, if I get the impression that some witness is
9 playing games and not being a good steward of time, I will let
10 that witness know, and that will stop. And I will let that
11 witness know in front of the jury, and it will stop. So that
12 basically that's sort of how I do it.

13 If, say, you've called -- if like, just again, to use
14 that example, if the Plaintiff calls Mr. Auerbach in its case
15 -- his case, then when he's examining him, it's coming out of
16 Plaintiff's time. But again, it's been my experience those
17 types of things -- it goes efficiently 'cause they're just
18 leading, and they know what they want to ask him. And then any
19 cross would come out of your time.

20 All right. So let's go through -- I'm going to go
21 through all of the motions in limine today except for the one
22 that has to do with the defense expert. I've read through all
23 the materials and I'm still thinking about it, and that's one
24 of the things we're going to talk about at 2:00 next week. I
25 mean, I know Plaintiff asked for a hearing on that. You're

1 going to get a hearing on that. And so I'll hear argument and
2 whatnot about that, and I'll make a decision on Friday, too, so
3 that y'all know going in whether that witness is going to
4 testify or not.

5 I'll also -- it's my -- I also anticipate, although
6 some of my rulings today in connection with the motions in
7 limine will touch on some of the exhibits that y'all have
8 mentioned in the motions, it's my typical practice in civil
9 cases to try and go through the exhibits and at least look at
10 them, look at the objections and see if I can make a ruling
11 'cause sometimes the document may not really make sense to me
12 until I'm kind of in trial.

13 So I would anticipate also next week -- I know that
14 the defense filed a document at -- my memory says it's docket
15 entry 310, but I didn't write it down -- that had some of the
16 objections. I know the Plaintiff has objections.

17 I'll go through those with y'all to the extent we're
18 sort of not covered on that today. I'll also try and go
19 through the deposition testimony just so that you know if I'm
20 -- and in some cases I may end up sort of just carving this out
21 and just put O or S, you know, overruled or sustained, just so
22 that you know and that you -- we have a record of whatever my
23 ruling is so that if you're trying to figure out what part of a
24 deposition or something is -- I'm allowing or whether I'm
25 letting in some document. We will talk about that next Friday,

1 too. But I realize today's rulings on some of the motions in
2 limine are going to touch on at least some of these exhibits.

3 I did on -- sort of going to page 116 of the pretrial
4 order, the defense -- and then I'll hear from you, Mr. Levy,
5 but I was surprised that there was designations of all
6 pleadings, all written discovery, all depositions, and then
7 there's not designations. That's just not compliant with our
8 rules. And so I think the objections there are well-taken, and
9 you're not going to have any of those things. So those --
10 those objections are sustained. And I will -- like I said,
11 next week we'll talk about these other ones, the designations
12 that have been made by the Plaintiff and then the objections
13 that are in the pretrial order or in that document at docket
14 entry 310.

15 So on to the motions in limine. The first motion is
16 a motion by Puma at docket entry 311 to exclude character
17 evidence regarding Alan Auerbach. The Plaintiff responded at
18 docket entry 352. And here I think the Plaintiff has the
19 better of the argument. At least what I've -- what I could
20 glean from reading the motion in limine is -- the basic point
21 is the evidence that Plaintiff is talking about with respect to
22 Mr. Auerbach isn't character evidence.

23 And issues associated with the proxy context, you
24 know, putting that in context for the jury, all that seems to
25 me to be relevant, and I just don't see it being -- evidence

1 being offered for him to act in conformity with some trait for
2 dishonesty or something like that, so that motion is denied.

3 The second motion is Puma's motion in limine to
4 exclude evidence of a reference to liability insurance, and the
5 Plaintiff responded to that that it didn't intend to do so
6 during the liability phase of the trial, and so I grant it as
7 to that. Now, the Plaintiff also said that it thought it could
8 be admitted during the punitive phase, and I would -- I'm
9 certainly willing to read cases. I've read a lot of them
10 already. Happy to read more. Read for a living. But you're
11 going to need to show me a case. I'm not -- I'm not aware --

12 I've never tried a case even where there was
13 insurance, even where the punitive damages were at issue that
14 insurance came in in the punitive damages phase. It's
15 certainly not consistent with the standard instruction that we
16 use in our state dealing with punitives. It doesn't reference
17 a defendant or a defendant's insurance. It talks about a
18 defendant's net worth. So, I mean, if you have a case, I'll
19 consider it, but tentatively, if we get to the punitive damages
20 phase, y'all should not expect to get insurance in, even at
21 that phase.

22 But I'm -- and really, with respect to all these, I'm
23 willing to read things. So -- but I would really need to see a
24 case -- and I'm not aware of one from a North Carolina
25 appellate court that says insurance comes in in the punitive

1 phase.

2 Docket -- so that motion is -- we'll characterize it,
3 for purpose of the docket, as granted in part, and I'll wait to
4 see if there's any follow-up on the issue of the punitive part
5 of this case.

6 The next one is docket entry 13, Puma's motion to
7 exclude evidence of Puma's corporate and/or financial
8 performance. There's a relevance objection and a 403
9 objection. Dr. Eshelman's response is at docket entry 347,
10 basically stating there's not a specification of the evidence
11 that we're really even talking about. But as with respect to
12 ruling on the stipulations, I mean, I think all that's
13 relevant. I mean, it's certainly -- the events leading up to
14 the preparation of the alleged libelous documents are relevant,
15 and then even some of the events afterwards as reflected in the
16 stipulations are -- I think that that evidence meets the
17 threshold under 401.

18 And having done the balancing under 403, I'm going to
19 admit it. And like -- and that also includes, to the extent
20 that the motion was trying to sort of exclude, you know, that
21 Puma dealt with PPD, that -- that's in the stipulations. It's
22 relevant. Not keeping it out under 403. So that motion at
23 docket entry 313 is denied.

24 The next motion by Puma is at docket entry 315 to
25 preclude Plaintiff from seeking to elicit opinion testimony

1 from lay witnesses and testimony not permissible under Rule
2 401, 402, and 403. The response of Dr. Eshelman is at docket
3 entry 349, which I largely agree with, no response.

4 So here's how that's going to play out. Certainly
5 Dr. Eshelman can testify as to his emotional distress. I would
6 be surprised and I wouldn't let him sort of opine that the
7 alleged libel caused him to get some medical disease or
8 something like that. I'm confident that he's not going to do
9 that, but to the extent a witness tried to do that, "Not only
10 was I upset and hurt and angry, I got cancer because of it."
11 It's like, no, I'm not going to allow that.

12 So -- and likewise, with respect to issue of
13 information that was out and available with respect to Puma,
14 what Puma could have investigated, I think, again, that's
15 relevant and admissible under 403. I think time limits have
16 their own way of getting lawyers to focus and not waste time,
17 but I'm going to allow that.

18 Special Agent Woods' testimony: You know, again, I'm
19 going to have to sort of hear the specifics of it, but -- but
20 generally him testifying about the investigation that he did in
21 the -- in terms of the factual component and to the extent that
22 he has some opinion about that, I'm going to allow that. I
23 think it's relevant. I'm not going to keep it out under 403,
24 but I'll -- but my ears will be perked up during that portion
25 of the testimony.

1 As to docket entry 316, the motion to exclude
2 evidence of other litigation against Puma and Auerbach, the --
3 again, there was a response from Dr. Eshelman that I largely
4 agreed with. I'm going to allow that. I obviously anticipate
5 Mr. Auerbach testifying, and it's in the stipulations, but I
6 certainly would anticipate that he would be crossed about the
7 2019 civil liability for securities fraud. It's 608.

8 So -- but sort of keeping out -- I don't know if --
9 my sense is that that's sort of the focus. And, again
10 Mr. Clare, you can clarify for me, but the whole issue with
11 respect to the drug and then the spike in the stock price and
12 then resulting litigation, that's what we're talking about,
13 right?

14 MR. CLARE: Yeah. That's correct, Your Honor.

15 THE COURT: Okay. Right. That's -- I'm going to
16 let that in. So that motion to exclude that evidence is denied
17 at docket entry 316.

18 Puma's motion at docket entry 317 to exclude
19 characterization of the statements at issue as defamatory. The
20 response of Dr. Eshelman is at docket entry 350, and the issue
21 in this case is falsity and actual malice, so I'm going to deny
22 the motion. The first three elements, I'm going to tell the
23 jury that those have -- they're established.

24 And, again, just for purposes of orienting y'all, I'm
25 still working on the charge, and I appreciate y'all's

1 submissions, but I can tell you I'm pretty comfortable -- and
2 that's sort of another thing. We haven't all collectively
3 tried a case together. I will, obviously, during the week of
4 the trial give you a copy of the instructions and the verdict
5 form, probably -- certainly not -- certainly not later than
6 Wednesday night. And we'll have the charge conference probably
7 at 8:15 on Thursday morning.

8 But I would anticipate, just so that y'all would
9 know, that I think for purposes of the verdict form that the
10 Plaintiff's proposed verdict form is -- more appropriately
11 captures and states what's at issue in this case, that in terms
12 of what the jury has to think about is, when read in the
13 context of the entire presentation, were Puma's statements that
14 Plaintiff, Fredric N. Eshelman was, quote, replaced as CEO of
15 PPD after being, quote, involved in clinical trial fraud, end
16 quote, false. And then they're going to have to reach the same
17 issue as to actual malice with respect to those statements.

18 And then issue 3 would be what amount of compensatory damages
19 is Fredric N. Eshelman entitled to recover from the Defendant?

20 That's at least -- I can tell you where I am now. I
21 think that that's what this case is about, those two issues on
22 falsity and actual malice, particularly in light of the summary
23 judgment ruling.

24 So for purposes of the clarity of the docket, docket
25 entry 317 is denied.

1 Docket entry 318 is Puma's motion to exclude any
2 evidence of Dr. Eshelman's intention to donate damages. The --
3 I would not anticipate this trial being about Dr. Eshelman's
4 wealth or some argument about, you know, don't hold this
5 defendant liable because it's an altruistic company trying to
6 help people with breast cancer. I just couldn't imagine that
7 any lawyer would argue that.

8 Likewise -- and so this -- I mean, so at the end of
9 the day, I'm not -- and I also don't see whatever Dr. Eshelman
10 might or might not do with the damages being relevant at all.
11 It's just not relevant. And so I know that -- I know the
12 Plaintiff's response, you know, characterized it, "Well, we're
13 -- you know, if there's an opening of the door to this, then we
14 want to be able to potentially bring this up."

15 Well, you can approach the -- you can approach me if
16 you think the door's been opened, but I don't expect -- I don't
17 expect this to devolve into something about an altruistic
18 company trying to help people with breast cancer and -- and
19 some other -- and the Plaintiff, who just wants to get some
20 kind of damages so he can donate it to charity. That's not
21 what this case is about.

22 I think that's all the motions in limine from the
23 defense. Now, for the motions in limine from the Plaintiff.
24 The first one is at docket entry 320, plaintiff's motion to
25 exclude -- it just characterizes heavily redacted document, but

1 then the focus seemed to be on Puma's Exhibit 63. And I did
2 read -- I did read that exhibit, and it is heavily redacted.
3 And it was confusing to me upon reading it, I can tell you, in
4 terms of -- there were so many redactions, it was unclear at
5 all what it meant.

6 I know the response was -- of the defense was --
7 well, to the extent that the agent who investigated this
8 testifies, you want to be able to cross-examine him about his
9 investigation. You certainly can cross-examine him about it,
10 but I think that that document -- and I assume that's just how
11 y'all have gotten it and whoever had it, but I think it's so
12 confusing and a waste of time that I -- I'm -- I don't see
13 letting that document in as an exhibit.

14 But now if you want to use that to refresh
15 recollection or something, that's fine. But it -- but I don't
16 see, given the extensive nature of the redactions, I just think
17 it's confusing and I would keep it out under 403 in light of
18 the multitude of redactions in it.

19 The next one is at docket entry 322, the motion to
20 exclude proposed testimony on hearsay grounds, and then there's
21 a discussion of deposition testimony of Dr. Eshelman, which I
22 don't anticipate there being any of that because you're going
23 to call him live and there weren't proper designations by the
24 defense, so I don't think there's going to be an issue about
25 his deposition.

1 But I'm going to go through the transcripts that
2 y'all have submitted, but we're going to observe the hearsay
3 rule. I can just tell you that. So to the extent that as I go
4 through it I think something's hearsay, I'll keep it out. So I
5 would anticipate granting that. To the extent there's hearsay
6 to keep out, I'll keep the hearsay out.

7 I also realize in this kind of trial, in particular,
8 there can be issues where it's not being offered for the truth,
9 and I'll be attuned to those issues and I'll listen to whatever
10 y'all might have to say about that with respect to evidence
11 that's being offered that you're saying is not being offered
12 for the truth.

13 The next motion is the motion to exclude evidence
14 concerning a case in New Jersey called *Princeton Ophthalmic,*
15 *LLC, versus Corinthian Ophthalmic* on the grounds that the
16 evidence is hearsay or unfairly prejudicial. Puma didn't
17 respond in opposition. I think as reflected in the motion,
18 those -- that type of complaint is inadmissible hearsay. It
19 was dismissed. I don't see how it's admissible under any sort
20 of theory that I'm aware of, so I grant the motion to exclude
21 evidence concerning that *Princeton Opthamalic* case at docket
22 entry 324.

23 The next one is a motion to exclude Puma's exhibits
24 concerning unrelated civil litigation against PPD at docket
25 entry 337, and the discussion in the motions have to do with

1 docket -- Defense Exhibits 50, 52, 54, and 58. Those
2 documents, I think, are irrelevant under 401, and I think
3 they're a waste of time under Rule 403, so Im going to exclude
4 those, so I grant that motion.

5 The next one is a motion to exclude newspaper
6 articles and other media concerning the Ketek fraud at docket
7 entry 331. The discussion, at least in the papers, had to do
8 with Defense Exhibits 64, 65, and 66. I have read those.

9 Mr. Levy, do you have a witness who's going to say
10 that they read these before they prepared the presentation?

11 MR. LEVY: No, Judge. The identification of those --

12 THE COURT: Okay.

13 MR. LEVY: To the extent the Court would like to hear
14 anything further, the identification of those articles was
15 simply from a standpoint that it is anticipated that Plaintiff
16 will argue, as they have in their papers to the Court, that
17 Dr. -- I should Mr. Auerbach could have, for example, consulted
18 with other sources prior to publishing the statements that are
19 at issue. So by contrast, these are also additional materials
20 that he could have consulted with that would have corroborated
21 what he wrote.

22 MS. MEIER: Your Honor, may I respond?

23 THE COURT: You may.

24 MS. MEIER: None of the articles at issue mention
25 Dr. Eshelman.

1 THE COURT: Okay. You kind of anticipated, 'cause I
2 was trying to remember. I had read them and I didn't remember
3 him -- 'cause that's the -- the sort of the whole -- part of
4 the whole case is this sort of clumping -- well, clumping PPD
5 with Dr. Eshelman. So -- and a separate corporation, in fact.
6 But I grant the motion to exclude those Defense Exhibits at 64,
7 65, and 66, especially in light of the admission that they --
8 they had -- they weren't read by anybody who prepared the
9 documents. I think they're hearsay. I also think they've got
10 a 403 issue because they don't mention Dr. Eshelman.

11 The next one is docket entry 333 to exclude evidence
12 concerning Dr. Eshelman's political affiliation. Puma didn't
13 respond to that. Just like as well, I don't see that as being
14 relevant. And I gather your response was basically 'cause
15 you're -- you didn't respond because you weren't going to offer
16 evidence about that.

17 MR. LEVY: That's correct, Judge.

18 THE COURT: Okay. Okay. All right. Well, I -- for
19 purposes of completeness, I grant the motion at docket entry
20 333.

21 The next one is the motion to exclude the expert
22 testimony of Dr. Shivdasani at docket entry 335, and we'll take
23 that up at 2:00 next Friday.

24 I think that's all the motions in limine.

25 MR. LEVY: Judge, very briefly on the motion

1 pertaining to Dr. Shivdasani. I simply wanted to inform the
2 Court that I conducted a for-trial deposition of Dr. Shivdasani
3 yesterday --

4 THE COURT: Okay.

5 MR. LEVY: -- which was attended by counsel for
6 Plaintiff. To the extent that the Court would like a copy of
7 the transcript from that deposition, I'm happy to file it.

8 THE COURT: That would be helpful for me to -- I'll
9 read it before we get back together.

10 MR. MEIER: Your Honor?

11 THE COURT: Yes.

12 MS. MEIER: May I respond to one issue?

13 THE COURT: Sure.

14 MS. MEIER: Docket entry 315, which was Puma's motion
15 in limine regarding lay witness testimony --

16 THE COURT: Right.

17 MS. MEIER: -- there was one piece of that motion
18 that I don't think I heard a ruling on.

19 THE COURT: Okay.

20 MS. MEIER: There -- one of the things they sought to
21 exclude was testimony from lay witnesses about how they
22 understood the presentation -- the presentation at issue, and I
23 don't think we had a ruling from you on that piece of that
24 motion.

25 THE COURT: I think that's admissible lay opinion

1 testimony, so that will be allowed.

2 MS. MEIER: Thank you, Your Honor.

3 THE COURT: Uh-huh.

4 (Pause.)

5 THE COURT: I think I've covered what I wanted to
6 cover with y'all. Is there anything else, Mr. Clare, that you
7 think we need to talk about today? Or any of y'all?

8 MR. CLARE: No, Your Honor. I think the rulings that
9 you've made are very helpful. As I hope you can see from the
10 stipulations, that we've worked very well with Mr. Levy, and I
11 anticipate no difficulty translating Your Honor's rulings
12 into --

13 THE COURT: Okay.

14 MR. CLARE: -- understandings about exhibits, and it
15 will help us to streamline the presentation of evidence, so we
16 thank you for taking --

17 THE COURT: Okay.

18 MR. CLARE: -- the time to do that, and we'll make --
19 I promise you we'll make good use of the week between now and
20 next Friday to make progress and make sure we've narrowed the
21 issues, if any, that we need to bring up then.

22 THE COURT: Okay. Right.

23 MR. CLARE: But from Plaintiff's perspective, we're
24 -- we appreciate it, and I think we have everything we expected
25 to cover today.

1 THE COURT: Okay. And this is for all of you as
2 lawyers appearing in this court, particularly in the well of
3 this court. None of you are visitors. So I know our CSOs like
4 everyone to have a visitor's badge when they're in the court
5 building anywhere, but in here, you are not visitors, and so
6 you do not have to keep your visitor's badge on.

7 (Laughter.)

8 THE COURT: And, again, I think that's really
9 important with -- I don't want jurors to ever think that any
10 lawyer who appears in the well of this court is a visitor.
11 This is where you perform your roles as advocates and live the
12 vocation that you've chosen, so you're not visitors here.

13 But I will tell you if you don't have your badge on
14 outside, the CSOs will talk to you.

15 (Laughter.)

16 THE COURT: Anything else from the defense?

17 MR. LEVY: Judge, just one point of clarification --

18 THE COURT: Sure.

19 MR. LEVY: -- with respect to Your Honor's rulings.
20 I understand and, of course, defer to the Court and its ruling
21 as it pertains to deposition designations from the defense.
22 However, to the extent that a witness is called and offers
23 testimony inconsistent with something that they've said in the
24 deposition, are we still permitted from an impeachment
25 standpoint --

1 THE COURT: Yes.

2 MR. LEVY: -- to present --

3 THE COURT: -- you are. And that's a good question.
4 That's a -- yes, you can, of course.

5 MR. LEVY: Okay.

6 THE COURT: Right, yeah.

7 MR. LEVY: And that's probably the confusion there,
8 but that was the only matter in which we envisioned using
9 those.

10 THE COURT: Okay. No. Again, that's a good
11 question, but I think from the perspective of people trying to
12 affirmatively introduce deposition testimony in their own case,
13 then that's partly why we have the local rules the way we have
14 them is say designate so I can see if somebody objects, so then
15 I can then make a ruling so that we can -- all of the rules are
16 designed to be good stewards of everyone's time, and especially
17 the jury's time.

18 So yeah, you absolutely can use a deposition if you
19 think somebody's giving testimony inconsistent with prior
20 deposition testimony.

21 I do thank y'all for all the work that you've put in.
22 It's clear that you have spent a lot of time and have had to
23 work together, too, and I will continue to work on the jury
24 instructions, and I thank you for your joint submission in
25 connection with those, and I look forward to seeing y'all next

1 Friday at 2:00.

2 And if there's anything else you need from me between
3 now and then, I'll be here.

4 We'll be in recess until 3:00.

5 (Proceedings concluded at 1:43 p.m.)

6
7 (END OF TRANSCRIPT.)
8

NORTH CAROLINA - CHATHAM COUNTY

CERTIFICATION OF REPORTER

I, Wanda B. Constantino, CVR-CM-M, contract court reporter for the United States District Court for the Eastern District of North Carolina, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the forgoing is a true and correct transcript of the proceedings held in the above-entitled matter;

That the proceedings were reported by me using the voice-writing (Stenomask) method; and

That the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 10th day of March, 2019.

Wanda B. Constantino, CVR-CM-M
Contract Court Reporter